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CHAMBERLAIN

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 10
1200 Sixth Avenue
Seattle, Washington

IN THE MATTER OF:	
Arrcom, Inc., Drexler Enterprises, Inc., George W. Drexler, Terry Drexler, Inc., Western Pacific Vacuum Service, Golden Penn Oil Co., Terry Drexler, Richard Cragle, Ronald Inman, W.A.(Alan)Pickett, Thomas Drexler, and Warren Bingham, Respondents.	RCRA Docket Nos. X83-04-01-3008 and X83-04-02-3008 (Consolidated)

COMPLAINANT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND SUPPORTING MEMORANDUM

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I. Introduction

This is a proceeding under Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended in 1980 (hereinafter "RCRA" or "the Act"), 42 U.S.C. § 6921 et seq. (1982). On May 10, 1983, the United States Environmental Protection Agency (EPA) issued two Complaints, Compliance Orders, and Notices of Opportunity for Hearing to several named respondents, concerning the handling of used oil at two separate facilities.

After amendment, complaint X83-04-01-3008 alleges that George W. Drexler; Arrcom, Incorporated; Drexler Enterprises, Incorporated; and Terry Drexler; Terry Drexler, Incorporated; Western Pacific Vacuum Service; and Golden Penn Oil Company all operated a new facility for the storage of hazardous waste in Tacoma, Washington without obtaining a permit for its operation. The complaint also named Ron Inman and Richard Cragle as owners of this facility. EPA asserts that this violation of the Act merits a penalty assessment of $13,500, jointly and severally, against all of these named respondents.

Complaint X83-04-02-3008 charges George W. Drexler; Thomas Drexler; William A. Pickett; Arrcom, Incorporated; and Drexler Enterprises, Incorporated as operators of an unpermitted and improperly maintained hazardous waste storage and disposal facility near Rathdrum, Idaho. Warren Bingham was also named in the complaint as the owner of this facility.1/ The complaint alleged violations in three basic areas -- a.) disposal (as opposed to storage) of hazardous wastes without a permit or interim status, b.) submitting a part A permit application for storage of hazardous wastes without obtaining the owner's

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1/ Mr. Bingham's hearing on this matter was severed from this proceeding by motion and order dated April 30, 1985. Mr. Bingham has since admitted liability and signed a consent agreement and order, which obligates Mr. Bingham to implement an approved closure plan at the facility. This does not affect complainant's action against other named respondents.

signature, and c.) numerous violations of regulations governing the operation of a hazardous waste storage and disposal facility operating under interim status. EPA asserts that a penalty of $73,500 is warranted for these violations, and asks that this amount be assessed against the five remaining respondents, jointly and severally.

A hearing was held on these matters on April 30, 1985, in Seattle, Washington, before the Honorable Thomas B. Yost, EPA Administrative Law Judge. Complainant EPA submits this memorandum in accordance with 40 CFR § 22.28, the Consolidated Rules of Practice, and with the Court's Order of May 9, 1985.

II. Argument

A. Statutory Framework -- RCRA

The Resource Conservation and Recovery Act, as amended in 1980 is a Congressional attempt to regulate the handling and generation, transportation, and treatment, storage, and disposal of hazardous wastes, from "cradle to grave." It reflects Congressional concern with the growing volume of hazardous wastes and discarded material in the United States. It was intended as a "comprehensive regulatory program, closing the 'last loophole' in environmental regulation." United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984). Subtitle C of RCRA, Sections 3001 through 3010, 42 U.S.C. §§ 6921-6930, establishes the basic framework for this regulation.

Section 3001 of the Act, 42 U.S.C. § 6921, requires the Administrator to promulgate regulations identifying and defining hazardous wastes by particular substance (listed wastes) or by characteristics (characteristic waste). These regulations are found at 40 CFR § 261.1-.33. In Section 3010, 42 U.S.C.

§ 6930, handlers of hazardous wastes are required to notify EPA of such activity within ninety days after the classification of their waste as hazardous wastes. Section 3005(a) of the Act, 42 U.S.C. § 6925(a), prohibits the ownership and/or operation of a hazardous waste facility for disposal, treatment or storage without obtaining a permit. Section 3005(e) allows the operation of such facilities if they existed prior to November 19, 1980, provided the facility notifies EPA of such activity, and files a proper Part A permit application. Facilities operating under this section are given interim status. However, new facilities which come into existence after November 19, 1980, cannot operate until fully permitted by EPA. Section 3005 also requires the promulgation of regulations reflecting these requirements. Those regulations are found at 40 CFR Parts 124 and 270 (1984). (Part 270 regulations were formerly codified at 40 CFR Part 122 (1981 & 1982)) Section 3004 of the Act, 42 U.S.C. § 6924, requires the Administrator to promulgate regulations establishing performance standards for hazardous waste storage, treatment, and disposal facilities. Those regulations are found at 40 CFR Parts 264 (new facility standards) and 265 (interim status standards).

Enforcement of these provisions is provided in Section 3008 of the Act, 42 U.S.C. § 6928. Under Section 3008, EPA is authorized to issue administrative complaints seeking civil penalties for violations of Subpart C and accompanying regulations of up to $25,000 per violation per day, and administrative compliance orders requiring immediate compliance with the requirements of Subpart C of RCRA, and its accompanying regulations.

B. Regulatory Framework--Defining a Hazardous Waste.

Hazardous wastes which are subject to regulation under RCRA Subtitle C are defined in 40 CFR Part 261. A substance must first be a solid

waste to be a hazardous waste, according to the definition of hazardous waste found in Section 1004(5) of the Act, 42 U.S.C. § 6903(5). Solid waste is defined in 40 CFR § 261.2, and includes refuse [§ 261.2(a)] and "other waste material" in liquid form resulting from commercial activities, which has served its original intended use and sometimes is discarded [§ 261.2(b)]. The preamble to these regulations, found at 45 F.R. 33084-33119 (May 19, 1980), makes clear that used oil was intended to be included in this definition. It states:

> The first category of materials which are regulated as "wastes" under RCRA are "garbage, refuse (and) sludge [Section 1004(27)]. These materials are almost always thrown away, and it is clear from both Section 1004(27) of the statute and its legislative history (H.R. Rep. at 2-4; S.Rep. at 5) that Congress regarded them as "wastes" regardless of their intended end use.
>
> Of those materials which are not garbage, refuse or sludge, it also seems clear that any material which is intended to be or is in fact thrown away, abandoned or destroyed is a "waste." As noted above, there appears to be no disagreement among commenters on this point and of course it is fully supported by the legislative history of RCRA.
>
> Of those materials which do not fall into either of these two categories--i.e., materials other than garbage, refuse or sludge which are (or are intended to be) used, re-used, recycled or reclaimed--it appears that there are two types of substances which Congress intended to be regulated as "wastes" under RCRA.
>
> The first are materials like waste solvents, paint wastes, waste acids, used drums and waste oil. These are what Congress referred to in the legislative history as "post-consumer wastes" or wastes which have "served their intended purpose" (H.R. Rep. at 2 and 9). While acknowledging that some of these post-consumer wastes might be recycled (see H.R. Rep at 3, 10), Congress also recognized that they were sometimes discarded, and therefore were "wastes" (see H.R. Rep. at 9-10). (Emphasis added)

The preamble also evidences EPA's intention that used oil, in addition to being a solid waste, could be considered a hazardous waste in certain circumstances. Solid waste, such as used oil, is

considered a hazardous waste when it is a mixture of a solid waste and a listed hazardous waste, found in 40 CFR Subpart D. [See, 40 CFR §261.3(a)(2)(1981) and 40 CFR §261.3(a)(2)(iv) (1982 - 1984)2/. Such substances become hazardous wastes from the time the listed hazardous waste is first added to the solid waste [40 CFR §261.3(b)(2) (1981 & 2)], and remains a hazardous waste until it is specifically excluded by a special rulemaking petition to the Administrator, or until the substance is destroyed. [40 CFR §261.3(d)(2)(1981 & 1982)].

A policy document written and used by EPA is relevant to this discussion. In a published enforcement guidance document titled "RCRA Enforcement Guidance: Burning Low Energy Hazardous Wastes Ostensibly for Energy Recovery Purposes", 48 F.R. 1157-1161 (March 16, 1983), EPA again stated its intention to treat used fuels, such as used oil, contaminated with spent solvents as hazardous waste, subject to appropriate enforcement action. In discussing when such used oil an be considered hazardous waste, the document reads:

> Automotive oils do not typically come into contact with solvents when used. . . .
> If fuels (such as used oil) contain significant concentrations of low energy organic compounds (such as spent solvents) not ordinarily present in virgin or unadulterated secondary fuels, this should be sufficient to determine these toxicants were added as wastes (and are therefore subject to hazardous waste regulation).

48 F.R. at 11159. (Emphasis and parenthetical comment added)

2./ The 1982 changes and renumbering of this regulation reflect the addition of some exceptions to the definition not relevant here.

All samples relevant to these actions contained significant levels of organic compounds associated with chlorinated and non-chlorinated solvents, EPA Hazardous Waste Nos. F001-F005, at quantities well above those normally found in virgin oil or unaltered waste oil. See, Composition and Management of Used Oil Generated in the United States, EPA Document 530-SW013 (November 1984).

C. Regulatory Framework--New Facility Permitting Requirements.

The permitting regulations required by Section 3005 of RCRA are found at 40 CFR Part 270 (Part 122 during 1981 and 1982). Hazardous waste management facilities which were in existence prior to November 19, 1980, are allowed to operate until final administrative disposition of its permit application, provided the facility operator has provided timely notice and filed a legitimate Part A application form. 40 CFR §270.1(b) and §270.10 [formerly §§122.21(c) and 122.22]. However, a distinction is made between these facilities and new hazardous waste management facilities. New hazardous waste management facilities are defined in 40 CFR §270.2 [formerly §122.22(b)] as any facility which began operation after November 19, 1980. Unlike interim status facilities, these facilities are absolutely prohibited from operating in any manner until a submission of Part A and Part B permit applications , and final agency action through issuance of a RCRA permit to these facilities. 42 U.S.C. §6924(a); Appendix I of 40 CFR Part 260, paragraph 15; 40 CFR §§270.10(b) and 270.10(f) [formerly §122.22(b)].

The obligation to obtain proper permits for a new facility rests with owners and operators of such facilities. (See discussion in part

III. B. 2, below) Owners and operators are defined in 40 CFR § 260.10.

D. Regulatory Framework--Interim Status Permitting Requirements and Standards.

Existing hazardous waste management facilities, or those which operated prior to November 19, 1980, are eligible for interim status, as described above. Interim status facilities may handle only those hazardous wastes which are indicated on the facility's Part A permit application, 40 CFR §270.71(a)(1) and §270.72 [formerly §122.23(b) & (c))]. Such facilities may not employ processes not specified on its Part A permit application--i.e., an interim storage facility cannot dispose of hazardous wastes. 40 CFR §270.71(a)(2) [formerly §122.23(b)]. Part A applications must contain the signature of the owner of the facility, as well as the operator. 40 CFR §270.10(b) [formerly §122.4(b)].

Standards applicable to hazardous waste management (HWM) facilities which qualify for interim status are found at 40 CFR Part 265. The standards apply to any existing (i.e., in existence before November 19, 1980) HWM facility, whether or not the facility owners and operators have notified properly, or submitted a proper Part A permit application. 40 CFR §265.1(b).

Subpart B of these standards contain general facility standards, setting basic requirements for the operation of any HWM facility. These include requirements for development and implementation of written inspection schedules (§265.15), development of a personnel training regimen, with written records reflecting this training (§265.16); and maintenance of a fence or other barrier system to control access to the facility (§265.14). Central to the "cradle to grave" scheme of RCRA is the Subpart B regulation requiring a written waste analysis plan, which provides for the regular, representative sampling

of wastes received by the facility (§265.13). This requirement ensures accurate tracking of hazardous wastes from their generation to their disposal or re-use.

Subpart C of the Part 265 regulations require facilities to perform basic safety exercises at a HWM facility. This includes operating the facility such that unplanned releases do not occur unnecessarily (§265.31), having an external communication device capable of summoning emergency assistance and having fire control equipment [§265.32(b) and (c)], and attempting to make contingency arrangements with local authorities (§265.37).

Subpart D of Part 265 addresses the need to develop a written contingency plan, describing procedures to be implemented when a emergency arises at the facility (§265.51).

Subpart E of Part 265 contains important requirements regarding manifests under the RCRA system. Section 265.71(b)(5) mandates that a facility retain copies of any manifests which accompany shipments of hazardous waste to the facility. These records must be kept for at least three years from the date of delivery. The facility must maintain a written operating record, describing quantities of hazardous waste received, and eventual disposition of the wastes (§265.73).

Finally, Subpart G of Part 265 requires an interim status facility to submit and maintain a closure plan for any facility (§265.112). All of these requirements are applicable to any interim HWM facility, including storage facilities.

The obligation to comply with these regulations, in terms of § 3008 civil penalty orders, rests with owners and operators of HWM facilities.

E. Regulatory Framework--The Reuse/Recovery Exception.

Although material which is sometimes reused or recycled is solid waste, and can be hazardous waste (see part II.B. above), in accordance with Congressional policy encouraging reuse and recycling of waste material, certain hazardous waste operations involving reuse and recycling are excluded from regulation under 40 CFR §261.6. However, the exclusion is not a complete exclusion. It applies in limited circumstances and in limited ways.

First, as the preamble to §261.6 regulation makes clear, sham recycling or recovery activities, such as the burning of hazardous wastes or hazardous waste constituents which have little or no heat value, are not within the scope of the reuse exclusion. 45 F.R. 33091-33094 (May 19, 1980). A reuse must be "beneficial" or "legitimate" to quality for this exclusion. As the published enforcement guidance document makes clear, the mixing of organic solvents, such as those listed under 40 CFR § 265.31, Nos. F001-F005, with waste fuel such as oil for burning or road oiling is not considered a beneficial or legitimate reuse of these substances, because of the low energy value associated with most of these substances. 48 F.R. 11157-11161 (March 18, 1983). See, In the Matter of Ashland Chemical Co., Docket Nos. 9-83-RCRA-10 & 9-83-RCRA-40, pp. 34-36 (June 21, 1984).

Second, even if an operation is considered as one leading to beneficial or legitimate reuse or recovery, the §261.6 exclusion is only a partial exclusion. Section 261.6(b) states that hazardous wastes that are considered hazardous wastes because they contain a listed hazardous waste found at §261.31 or §261.32 (as is the case here) are subject to specific storage requirements, including the permitting requirements of Part 270 (formerly Part 122) and the operating standards of Subparts A through L of Part 265. All violations charged here are within those requirements. Thus,

even if the activities conducted at the two sites are determined to involve legitimate reuse or recovery, the statutory and regulatory obligations at issue here are applicable to these facilities.

Lastly, operation of a reuse/recovery facility does not excuse or condone sloppy and/or intentional practices which result in the placement of significant quantities of hazardous wastes upon the ground and into the environment. Such practices are disposal practices, as defined at 40 CFR § 260.10, not reuse or recovery, and facilities at which these practices take place are subject to the disposal facility permitting requirements of section 3005 of the Act and 40 CFR § 270 (fromerly part 122). Hazardous wastes handled in such a manner are not reused or recycled, beneficially or otherwise. Section 261.6 has no application to activities of this kind.

III. The Tacoma Site--X83-04-01-3008

A. Factual Background at the Site.

Respondents Arrcom, Inc., and Drexler Enterprises, Inc. 3/ are corporations responsible for beginning the operation of a business involving storage of used oil and solvents located at 1930 "C" Street in Tacoma, Washington. The President of both corporations was respondent George W. Drexler. (Transcript p. 271, 290) 4/ Respondent Terry Drexler, Incorporated was a corporation doing business as Golden Penn Oil Company, and Western Pacific Vacuum Service. (R231) Respondent Terry Drexler was the president of all these corporations and organizations. (R231) They subleased the 1930 "C" Street storage facility from Arrcom. (R232-4) Respondents Richard Cragle and Ronald Inman are

3./ Arrcom, Inc. and Drexler Enterprises, Inc. are considered interchangeable corporations without distinct existences by their President, George Drexler. (Transcript, p.271) The two corporations will be collectively referred to as "Arrcom" throughout this portion of the brief.

4./ Hereinafter, references to the transcript wil be labelled R_____.

individuals who are property owners and lessors of the facility. (R220, Answer of Inman and Cragle, p.1)

Respondents Cragle and Inman leased a portion of a warehouse facility belonging to them in August of 1981, to Empire Refining Company, another corporation headed by George W. Drexler. (R220-221) The facility consists of a cemented or asphalted yard, under which are three underground storage tanks. (R116-118, 222-224) An unused loading rack and a small shed are also located on the premises. The premise address is 1930 "C" Street in Tacoma, Washington, an industrial area within the city limits of Tacoma, surrounded by other industrial facilities. (R116-117, R221-225.)

Empire/Arrcom began using the facility in August of 1981, for the storage of used oil and other material. (R273-274, 277-278) On December 3, 1981, respondent George Drexler admitted to EPA permitting person Linda Dawson, that the facility was used for the storage of waste oil and solvents (Complainant's Exhibit 9--Idaho; R61-63). Alan Pickett, an employee of Arrcom, Inc. and acting secretary of Arrcom, Inc. and Drexler Enterprises, Inc. (R269; Answer of George Drexler, p. 2 (Attachment I), confirmed this in a conversation held on the same day (C. Exh. 8--Idaho). After written requests by EPA, on January 6, 1982, Arrcom/Drexler submitted a notification of hazardous waste activity, which listed characteristic ignitable waste in the form of usedoil (Haz. Waste No. D001), and listed, nonhalogenated, organic spent solvents (Haz. Waste No. F003 and F005) (Cmplt. Ex. 1--Tacoma) as hazardous waste which was handled at the facility. The notification indicated that this hazardous waste material was stored, treated or disposed of at the 1930 "C" Street facility. (Id.) A Part A permit application was submitted by Arrcom at the same time. It stated that 30,000 gallons of spent solvents and 500,000 gallons of used oil were estimated to be stored at the site on an annual

basis, in the underground storage tanks, presumably as a mixture (Cmplt. Ex. 3--Tacoma). It also stated that the starting date for the facility was August 1, 1981 (Id., p. 3). Both the notification and the Part A permit application listed respondent George Drexler as the facility contact for the 1930 "C" Street facility. (Id.)

The Part A permit application was rejected by EPA as incomplete. (R74-76) Numerous deadlines were set for resubmittal of all proper forms. If this was not possible, Arrcom was given the option of submitting and implementing a closure plan for the facility, pursuant to 40 CFR Part 265. (Cmpt. Exh. 5--Tacoma). (At the time, it was not clear to EPA that the facility was a new facility which could not qualify for interim status) Subsequent to this letter exchange, Arrcom subleased the facility to Terry Drexler and Terry Drexler, Inc., presumably to continue the same storage activities involving used oil and spent solvents. (R232-4) To date, neither Arrcom nor its subleasee have completed the necessary application forms before a new facility Part B permit can issue, nor have they submitted a closure plan. (Cmplt. Ex. 48, p. 24-26)

EPA conducted an inspection at the facility on June 9, 1982. Respondent Terry Drexler accompanied EPA inspectors during this visit. Terry Drexler stated that his corporation was currently subleasing the facilty from Arrcom, for use as a storage facility. (R116-118, Brown deposition p. 10-12; Cmpt. Ex. 8 and 10--Tacoma) Contrary to later assertions by Terry Drexler, waste oil and spent solvents were actively placed into the tanks by Terry Drexler and his corporation prior to this inspection. (R116-124, 232-4, 250-2)

A sample of the oil in one of the underground tanks was taken by

EPA inspector William Abercrombie. (R117-120) In a followup letter to the inspection dated July 27, 1982, Terry Drexler was informed that if the presence of listed wastes was found in the used oil, all requirements under 40 CFR §261.6(b) would be applicable. (Cmpt. Exh. 11--Tacoma, p.2) Although the letter was primarily concerned with a proposed treatment operation which never occurred, the letter repeatedly advised Terry Drexler that proper permitting requirements had to be completed prior to the commencement of any storage operation at the facility. (Id., p. 1 & 3) A copy of this letter was sent to respondent Richard Cragle, the property owner. (Id., p. 4)

Analysis of the used oil sample was done by Washington State Department of Ecology laboratories, and by EPA regional laboratories. The State analysis revealed that the waste oil flash point, or temperature at which the material would ignite, was below 140° F. (Compt. Ex. 10--Tacoma, p. 5) Analysis at EPA laboratories revealed the presence of several hazardous wastes, including toluene, a listed hazardous waste at 40 CFR § 261.31, at 1.7×10^7 ug/L, or 1700 parts per million (ppm), (Cmpt. Exh. 7--Tacoma), as well as trace amounts of ethylbenzene and methylene chloride. This is a significant concentration of toluene--well above the mean of 500 ppm found in waste oil. See, Composition and Management of Used Oil Generated in the United States, EPA Doc. No. 5630SW-013 (November 1984). Analysis also revealed the presence of napthalene bis(2-ethylhexyl)phthalate, and di-n-octyl phthalate in significant quantities. These are listed hazardous wastes under § 262.33. Respondent Terry Drexler stated that suppliers of the oil which was stored in the tank added this solvent to their oil (R241-43).

No further permit applications were ever received concerning the "C" Street facility. The facility is still used by Terry Drexler as a storage

facility. (R235-6) EPA issued a Complaint and Compliance Order in the matter on May 10, 1983, informing all parties that continued operation of the facility with substances such as were found in 1982 was illegal. To date, no closure plan or further permit applications have been submitted or implemented for the facility. It continues to operate illegally to this very day.

B. Respondents Have Violated the New Facility Permitting Requirements.

One of the most basic and fundamental requirements of the RCRA legislative scheme is the Congressional mandate that no HWM facilities can operate without obtaining a permit from the appropriate regulatory agency. Section 3005 of the Act reflects this basic mandate by stating:

> (T)he treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit. 42 U.S.C. §6924(a).

The only exception to this ban on hazardous waste activity until full permitting is completed is for those facilties that meet the carefully defined special condition of interim status, as clearly stated in Section 3005(e), 42 U.S.C. §6925(e). The 1930 "C" Street facility began operation well after the November 19, 1980, cut-off date found there. Thus, the operation of the 1930 "C" Street facility as a storage facility for used oil contaminated with hazardous wastes was and is simply illegal, and continues to be illegal to this day. George Drexler and his various corporate identities operated the facility in late 1981 and early 1982. They admitted, in spoken word and written word, that they stored waste oil and spent solvents at 1930 "C" Street prior to recycling efforts elsewhere. This makes them liable for the illegal operation of a hazardous waste management storage facility without a permit. This operation was turned over to Terry Drexler and his various corporate identities:

They admitted that they used the facility to store waste oil which was contaminated with spent solvents. Laboratory analysis of oil belonging to Terry Drexler confirmed this admission. They are also liable for the illegal operation of a hazardous waste management storage facility, without a permit. Richard Cragle and Terry Inman were and are the owners of this facilty. Under RCRA, they are liable for the same illegal activities. No defense argued by respondents can prevent this liability. Theri leasing of premises to the remaining respondents was itseof such participation and/or aiding and/or abetting as to result in joint and several liability on Cragle and Inman, as explained later herein.

1. Corporate Liability

Corporations leased and subleased the "C" Street facility, but both corporate entities and individual officers of those corporations are charged here. Section 3008(a) of the Act, 42 U.S.C. §6928(a) authorizes administrative complaints against "any person . . . in violation of this subchapter." "Person" is defined in 42 U.S.C. § 6903(15) as, among other things, an individual or a corporation. The permitting requirements of Section 3005 and 40 CFR Part 270 are applicable to both operators and owners of HWM facilities. As long as the persons charged here meet the definition of operator found at 40 CFR §260.10, they are liable for violations--whether they are corporate entities or individuals.

The concept that corporate entities and individuals can be liable for penalties for the same acts has long been recognized in federal law for a number of years. E.g., United States v. Dotterwich, 320 U.S. 277 (1943); United States v. Wise, 370 U.S. 405, 408 (1962); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); United States v. Beusch, 596 F.2d 871, 877 (9th Cir. 1979);

70 C.J.S. §6, Penalties. This principle is especially appropriate for violations of public health and safety regulatory statutes, such as RCRA. See, Dotterich, supra, 320 U.S. at 283. This principle applies to actions for civil penalties issued by regulatory agencies. E.g., United States v. Danube Carpet Mills, Inc., 737 F.2d 988 (11th Cir. 1984); United States v. Appendagez, Inc., 560 F.Supp. 50 (Int.Ct. of Trade 1983); United States v. Bestline Products Corp., 412 F.Supp. 754 (N.D. Calif. 1976). The underlying reasoning for this was articulated by the Bestline Court in the following manner:

> It would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices.

Id., 412 F.Supp. at 763. Individual liability is particularly appropriate in closely held corporations, which are essentially controlled by one person, as here. Award Petroleum, Inc. v. Vantage Petroleum, Corp., 529 F.Supp. 269, 272 (E.D. N.Y. 1981).

Both corporate entities and actively involved individuals can be charged as persons, if they are operators of HWM facilities, and both can be found liable for civil penalties. The individuals charged in this action were actively involved operators of the facility. George Drexler was the president and sole shareholder of Arrcom. He was listed as the facility contact on notification and Part A permit application forms. George Drexler arranged the sublease of the facility to Terry Drexler, and George Drexler met with EPA officials on July 15, 1982, as the official representative of Arrcom. George Drexler was an individual operator of the "C" Street facility, who controlled the activities there during Arrcom's reign.

ATTACHMENT 3

Description of the Facility

That portion of the Tracts 17 and 24, Plat No. 2, GREENACRES IRRIGATION DISTRICT, Kootenai County, Idaho, according to the plat thereof recorded in Book B of Plats at Page 51, records of Kootenai County, Idaho, described as follows:

COMMENCING at the Northeast corner of said Tract 24; thence, North 89°32'45" West along the North line of said Tract 24, 208.0 feet to the Southwest corner of land described in the deed to Sam Green and wife recorded October 26, 1961 in Book 187 of Deeds at Page 216; being the TRUE POINT OF BEGINNING; thence, South 10°26'45" East 241.15 feet to a point on the Northwesterly line of State Highway 53; thence, South 49°20' West along said Northwesterly line 209.0 feet to an intersection with the Easterly line of land described in the deed to Theodore Day and wife recorded June 2, 1978 in Book 291 of Deeds at Page 449; thence, North 4°24' West along said Easterly line, 408.0 feet to the most Southerly Southwest corner of land described in the deed to Theodore Day and wife recorded April 21, 1978 in Book 290 of Deeds at Page 484; thence, South 89°32'45" East along the South line of said Day land, 147.1 feet to a point on the West line of land described in said deed to Sam Green and wife above mentioned; thence, South 0°24' West along said West line, 31.5 feet to the TRUE POINT OF BEGINNING.

Likewise, Terry Drexler was (and is) the overall person in charge at the "C" Street facility, after Terry Drexler, Inc. subleased the facility. He was the president of Terry Drexler, Inc. He met EPA officials at all inspections. His testimony reveals that he controlled activities at the facility, which led to the storage of hazardous waste at the facility. Terry Drexler was (and is) an individual operator of the "C" Street facility, who controlled the overall activities at the facility.

2. Liability of Putatively Non-Participatory Owners.

(a) Statutory Liability.

Under common law vicarious liability theories, lessors who are not intimately involved in wrong-doing by the lessee are not liable for the lessee's activities. Amoco Oil Co. v. EPA, 543 F.2d 270 (D.C. Cir. 1976) (Clean Air Act); Restatement (2d) of Torts, 355-7 and 377-79. However, (1.) that rule is subject to exceptions stated in the Restatement (2d) of Torts, §§ 834, 876, 877(c), 877(d), 877(e), and 878, and (2) Congress has the ability to specifically alter these normal rules, and impose liability on non-participating owners. Amoco Oil, supra, 543 F.2d at 292-3. This was done under certain portions of the Clean Water Act, and under the Superfund Law, 43 U.S.C. §§ 9601 et seq. Non-participatory landowner liability has been upheld there. E.g., United States v. Argent Corp., 21 ERC 1354 (D. N.M. 1984). Because of the heightened concern for the proper treatment of hazardous wastes, the same thing was done under RCRA. This is shown by the plain language of RCRA and by the legislative history which accompanied RCRA.

Section 3004 of RCRA requires the promulgation of regulations "applicable to owners and operators" of HWM facilities, concerning standards for operation of those facilities. Section 3005 mandates that an HWM facility cannot operate without a permit, according to regulations established by the

Administrator. The regulations found at 40 CFR Part 270 (formerly Part 122) state, at 40 CFR §270.1(c), "RCRA requires a permit for the treatment, storage, or disposal of any hazardous waste, as identified or listed in 40 CFR Part 261. . . . Owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit, ..." The plain language of the statute and regulations promulgated thereunder demonstrate that Congress intended to impose a duty to obtain permits on both the operator and the owner, if they are different persons.

Any question as to this intent can be put to rest by the legislative history accompanying RCRA. House Report No. 94-1491 (Sept. 9, 1976) was the major legislative report accompanying and explaining RCRA. In commenting on requirements for HWM facilities, the report states:

> It is the intent of the Committee that responsibility for complying with the regulations pertaining to hazardous waste facilities rest equally with owners and operators of hazardous waste treatment, storage of disposal sites and facilities where the owner is not the operator.

H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 28 reprinted in (1976) U.S. Code Cong. & Ad. News 6266. (Emphasis added)

Congress specifically altered the common law rules of liability for non-participatory owners, in the hazardous waste context, when it enacted RCRA. Just as in cases under CERCLA and the Clean Water Act, that alteration should be recognized here, and owners Richard Cragle and Ronald Inman should be held jointly and severally liable for the violations alleged in this complaint, on the basis of such statutory construction.

(b) Vicarious Liability For Regulatory Violations.

Wholly apart from the "statutory construction" basis for imposing liability upon Cragle and Inman as "owners" under RCRA, there is an independent

basis for imposing vicarious liability upon them as collaborators in the regulatory violations committed by the remaining respondents, at least where hazardous substances, materials or wastes are involved.

The word "collaboration" is used to indicate that conduct not amounting to "aiding and abetting" in the criminal law sense, and not amounting to "conspiracy" in the civil or criminal sense, may nevertheless be a sufficient basis for imposing vicarious liability. The principles set forth in the Restatement of Torts, Second, §§ 834 (nuisance), 876(b) ("substantial assistance or encouragement), 877(c) through (e) (collaborative acquiescence or assistance), and 878 (common duty), when taken together, show that vicarious liability for Federal regulatory violations occurring on premises may be imputed to the lessors and/or owners of the premises when one, or any combination of, the following factors demonstrates that the respondents have collaborated in the violations, (which means simply that such vicarious liability is warranted by facilitating and/or consciously supporting conduct if its imposition is not inconsistent with, and in fact enhances, the Federal policies underlying the requirements violated on the premises): (A) notice and/or knowledge (actual or constructive) of the intended or probable activities on the premises; (B) right to control contractually or otherwise the activities actually conducted on the premises; (C) affirmative encouragement and/or assistance by the owner facilitating use of the premises for the conduct from which violations arose; and (D) tacit or passive approval, suffererance, allowance, or acquiescence by the owner or lessor in the activities actually conducted.

The "nexus" for imposing liability vicariously upon the premises owners or lessors, is not "fault" or "negligence" or "conspiracy" or "aiding and abetting" (although any of those grounds may well suffice for imposing such liability). Rather, the nexus lies in the ability of an owner or lessor

to inquire about prospective activity and to police what is engaged in in fact rather than relying on mere "boiler-plate" clauses in lease or rental agreements to the effect that the lessee or renter will "comply with all applicable laws and regulations".

The principles of the cited sections impose liability strictly, regardless of any "fault" as such on the owner's or lessor's part, and do not articulate any specific affirmative duty for them to find out and remain aware of what is going on in regard to the premises. Thus, an out of state heir inheriting a warehouse might very well lease it by mail to lessees of unknown repute, and because to the overall status and relation of such owner to the prospective activities, no vicarious liability is incurred. Conversely, the commercial lessor who "doesn't want to know" the details of what activities will transpire on the premises or who affects ignorance or naive reliance on boiler-plate clauses in leases or rental agreements may very well incur such vicarious liability as a "collaborator". That same commercial lessor who fails to inspect and/or terminate a lease when he had the right to do so may thereby become a collaborator. With the ubiquitous nature of activities involving, as we now know, hazardous materials, substances, or wastes, the owners of lands or buildings cannot pretend they are mere "demise or bareboat charterers" deprived of control over the premises let as obviously is the case with seagoing vessels.

Finally, it should be noted that the imposition of vicarious liability on Cragle and Inman actually confers an incidental benefit on all the respondents in that a single overall penalty amount can be adjudged jointly and severally against all the respondents, who then in turn may have rights of contribution and indemnity against one another under State and/or Federal law. If penalties are "allocated", no such rights can be asserted.

Admittedly, this tribunal lacks the jurisdiction to determine whether federal rights of contribution and/or indemnity do exist in the premises because this tribunal cannot adjudicate such private rights, but in cases of vicarious liability that is the normal under state or Federal law result simply because the vicarious liability is imposed strictly regardless of independent fault.

Counsel have not to date discovered any decided cases directly discussing vicarious liability for Federal regulatory violations and must rely upon the cited sections of the Restatement of Torts Second and the foregoing analytical reasoning to support this segment of Complainant's contentions.

3. Presence of a Hazardous Waste at the "C" Street Facility.

As explained in part II.B. above, used oil contaminated with listed wastes found in 40 CFR §§ 261.31 and .33 is considered a hazardous waste. This is especially true when the organic listed wastes are found in significant quantities. George Drexler admitted to storing used oil and spent solvents at the facility, presumably as a mixture. Forms sent to EPA by George Drexler and Arrcom admitted and confirmed the presence of listed wastes F003 and F005 in storage at the facility. Samples taken from Terry Drexler's oil revealed the presence of significant amounts of toluene, a listed waste under Hazardous Waste No. F005, and other spent solvents found at 40 CFR §§ 261.31 and .33 Hazardous waste was present at the "C" Street facility.

4. The Reuse/Recovery Exception.

As explained in part II.E. above and stated in 40 CFR §261.6(b), the reuse and recovery of used oil contaminated with certain listed hazardous wastes does not except it from the permitting requirements for HWM storage facilities, which are alleged to be violated here.

5. The Plea Bargain Entered Into by Certain Respondents Does Not Affect This Proceeding.

Respondents George Drexler and Terry Drexler entered into an agreement with the United States Attorney for the Western District of Washington on December 10, 1982, in which they agreed to plead guilty to certain charges in exchange for several acts on the part of the government. This agreement is attached (Attachment 2). As paragraph 5 of the agreement makes plain, the government agreed to forego the prosecution of further criminal charges based on respondent's business activities prior to Nov. 24, 1982. No mention is made of civil proceedings such as this one. EPA was not a party to this agreement.

Mr. Stephen Schroeder, Assistant U.S. Attorney, supports this interpretation of the agreement in a letter to EPA attorney, Barbara Lither (Attachment 3). As he states, the plea bargain has no effect on any civil actions which the United States may deem appropriate against the Drexlers. This proceeding is not effected by the agreement.

C. The Proposed Penalty is Appropriate.

1. Statutory and Policy Considerations.

Section 3008(c) of the Act, 42 U.S.C. §6928(c), states:

> Any order issued under this section . . . shall state with reasonable specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

Section 3008(g) of the Act, 42 U.S.C. §6928(g), states:

> Any person who violates any requirement of this subtitle shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

As of the date of issuance of the complaint, EPA had not formally adopted penalty guidance for violations of the hazardous waste management regulations. In December of 1980, EPA distributed a draft penalty policy which has not been and will not be adopted by EPA as a formal document, but this document has been acknowledged and used as guidance in many decisions on administrative actions under the Act. 5/ The draft policy provides a description of the various factors applicable in determining a penalty.

The draft policy asks the penalty assessor to do three things. First, he or she must determine the appropriate class of the violation. This is determined from a pre-determined classification of each potential violation of the RCRA scheme, which divides the potential violations into three classes. Each class carries a range of penalty amounts. Second, the assessor must rate the damage or potential for harm of the particular violation. Relevant to this determination is the intrinsic hazard of the waste and the likelihood of exposure. Damage or potential for harm is ranked as major, moderate or minor. Finally, the assessor is asked to assess the conduct of the particular violator, in terms of the extent of deviation from management standards or regulatory requirements. This also is ranked as major, moderate or minor.

In this case, this assessment is reflected in Complts. Ex. 25--Tacoma, a penalty matrix worksheet prepared by Michael Brown, EPA RCRA compliance person, and in Mr. Brown's testimony found in pp. 27 through 29 of

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5/ In the Matter of Cellofilm Corporation, Docket No. II-RCRA-81-114, August 5, 1982; In Re Fisher-Calo Chemicals and Solvents Corporation, Docket No. V-W-81-R-002, October 8, 1982; In the Matter of Gulf and Western Manufacturing Company, Docket No. 82-1026, November 29, 1982; In the Matter of Koppers Company, Inc., Docket No. RCRA-III-012, June 21, 1983; In the Matter of Willis Pyrolizer Company, RCRA Docket No. 83-H-002, December 5, 1983; In the Matter of L.H., Inc. and C & D Oil Co., Docket No. V-W-83-010, February 28, 1984.

his deposition transcript. Operating without a permit in this circumstance, was judged to be a Class II violation. Although the policy asserts violations of the statute proscription against operating without a permit is a Class I violation, a subsequent guidance memorandum titled "Guidance on Developing Compliance Orders Under Section 3008 of the Resource Conservation and Recovery Act", July 7, 1981, ranked such a violation as a Class II violation in most cases. Accordingly, Mr. Brown determined the violation to be a Class II violation.

As for the potential for damage classification, contaminated used oil, both in storage and in burning, has long been a concern with EPA, and has been specifically addressed in several preamble statements issued by EPA. Some of The hazardous wastes involved, spent solvents, are listed in 40 CFR §261.31 under Waste No. F001-F005. Such wastes are toxic and ignitable. As stated in the document used to justify the listing of solvents, toluene, the hazardous waste constituent found in the greatest amount here, is toxic by ingestion, inhalation and skin absorption. Further, other hazardous wastes found in significant quantities are listed as acutely hazardous wastes (H) in 40 CFR § 262.33.

In addition, the testing of the oil revealed a flashpoint below 140° F, for the waste oil. As described by the owner of the property, the facility is located in an industrial center within the city limits of Tacoma, Washington, and is surrounded by other buildings (R121-24, 221). Any fire or explosion could cause significant damage. George Drexler himself colorfully described an explosion and damage done to an earlier storer of allegedly contaminated used oil at the facility (R276). In view of these factors, the potential for harm was rightfully regarded as major.

Conduct was ranked as major here. According to Mr. Brown, this

ranking was based upon the fact that repeated attempts to seek compliance or closure at the facility were futile (EPA Ex. 48, p. 28; Compt. Exh. 5--Tacoma). The facility still has not been properly permitted or closed, as ordered by EPA in the compliance order. Mr. Cragle and Mr. Inman, the owners, have chosen not to terminate the lease at the facility, despite obvious breaches related to unpermitted subleasing by Empire Refining Co. (R224-26). In view of all this, the ranking of major for conduct in this case is warranted.

Putting the three factors together--a Class II violation, with major damage or potential for harm, and major conduct deviation--a penalty range of $15,000 to $12,000 is established, according to the recommended matrix. Thirteen thousand, five hundred dollars ($13,500) is the mid-point in that range. That amount is the appropriate penalty for this violation.

It should be noted that, unlike other environmental statutes, RCRA does not provide that ability to pay is a factor in assessing penalties. As was held previously in In re Wheeling-Pittsburgh Steel Corp., Docket No. RCRA-III-070 (March 20, 1985), such factors as the respondents' income or ability to pay or continue in business should not be a factor in this determination.

2. Joint and Several Liability.

Upon further research and reflection, complainant has altered its position on full and separate liability for each respondent. In view of the fact that the complaint alleges one violation for the activities conducted at the "C" Street facility, one penalty of $13,500 should be assessed against the respondents found liable here. This obligation should be a joint and several obligation against all such respondents, as is traditional under common law tort liability.

D. Proposed Findings of Fact Re Penalties.

1. Respondents Richard Cragle and Ronald Inman are individuals who own property, consisting of a shed, an overhead loading rack, and three underground storage tanks, located at 1930 "C" Street, in Tacoma, Washington.

2. Respondent Arrcom, Inc. is a corporation which did business in the State of Washington. Respondent Drexler Enterprises, Inc. is a corporation which did business in the State of Washington. The president and major stockholder of each corporation was respondent George W. Drexler.

3. Respondent Terry Drexler, Incorporated is a corporation which did business in the State of Washington. The corporation did business under the names of Golden Penn Oil Company and Western Pacific Vacuum Service. The president of this corporation and these organizations was Terry Drexler.

4. On August 1, 1981, respondents Cragle and Inman leased the property at 1930 "C" Street to Empire Refining Co., a corporation controlled by respondent George Drexler. Cragle and Inman are residents of Tacoma, Washington, and are lessors of other commercial property in the Tacoma area. They personally and directly received rental payments from the operator respondents.

5. Arrcom, Inc. and Drexler Enterprises, Inc., and George W. Drexler operated a business at 1930 "C" Street, beginning on August 1, 1981. The business included the management of used oil and spent solvents, by storage of these materials. Spent solvents are materials listed as hazardous wastes by the Environmental Protection Agency (EPA) under Section 3001 of the Act, 42 U.S.C. §6921, and found at 40 CFR § 261.31. A mixture of used oil and listed spent solvents is a hazardous waste, pursuant to 40 CFR §261.3(a)(iv).

6. Arrcom, Inc. submitted to EPA a Notification of Hazardous Waste Activity and a Part A Permit Application for this business. Respondent's Part A application indicated the business stored listed hazardous wastes, EPA Hazadous Waste No. F003 and F005, in significant quantities. The submissions listed George W. Drexler as the contact person at the facility. George Drexler controlled the operation of the business at 1930 "C" Street.

7. EPA rejected the Part A application as incomplete. EPA set two deadlines for resubmission of the application, or submission of a closure plan for the facility. No one resubmitted the Part A application or closure plan for the facility.

8. Some time in early 1982, respondents Terry Drexler and Terry Drexler. Inc. subleased the 1930 "C" Street property from Arrcom, Inc. and continued operation of a storage business on the premises.

9. On June 9, 1982, a sample of used oil stored in one of the tanks at 1930 "C" Street was taken by EPA agent William Abercrombie. Analysis of that oil revealed the presence of several listed hazardous wastes, including the presence of toluene at 1700 ppm (Haz. Waste No. F003, 40 CFR §261.31), and traces of ethylbenzene (Haz. Waste No. F003, 40 CFR §261.31) and and methylene chloride (Haz. Waste No. F002, 40 CFR §261.31), napthalene at 320 ppm (Haz. Waste No. U165, 40 CFR §261.33), bis (2-ethyl hexyl) phthalate (Haz. Waste No. U028, 40 CFR § 262.33) at 3400 ppm, and di-n-octyl phthalate (Haz. Waste No. U107, 40 CFR §262.33) at 2000 ppm were also found in the oil sample. These are listed hazardous wastes pursuant to 40 CFR §§ 261.31 & .33(f). Thus, the stored oil was a hazardous waste pursuant to 40 CFR §261.3(a)(iv).

10. On July 15, 1982, EPA inspected the facility, and met with George W. Drexler and Terry Drexler, to explain requirements for the storage

of hazardous wastes.

11. On July 28, 1982, William Abercrombie, EPA designated inspector sent a letter to Terry Drexler, informing him that oil stored at the 1930 "C" Street facility would be hazardous waste, if certain listed wastes were present in the oil, and that operation of the facility prior to clearance of regulatory hurdles was not permitted.

12. The facility has continued to operate as a storage facility for used oil, which is possibly contaminated with listed hazardous wastes.

13. To date, no complete Part A and Part B permit applications have been filed for the facility, nor has any closure plan been submitted or implemented for the facility.

E. Proposed Conclusions of Law Re Penalties.

1. Respondents Richard Cragle and Ronald Inman are owners of a new hazardous waste management (HWM) facility, a tank storage operation, and as such are subject to the requirements of Section 3005 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §6924 , and 40 CFR §270.10(f) [formerly 40 CFR §122.22(b)].

2. Respondents George W. Drexler, Arrcom, Inc., Drexler Enterprises, Inc., Terry Drexler, Terry Drexler, Incorporated d/b/a Western Pacific Vacuum Service and Golden Penn Oil Company are or were operators of a new HWM facility, storing hazardous waste containing hazardous wastes listed in 40 CFR §§261.31 and .33 and, as such, are subject to Section 3005 of RCRA, 42 USC §6925, and 40 CFR §270.10(f) [formerly §122.22(b)].

3. Between August 1981 and early 1982, respondents Richard Cragle, ..

Ronald Inman, George Drexler, Arrcom, Incorporated, and Drexler Enterprises, Incorporated owned or operated a new hazardous waste management facility for storage of hazardous waste without a permit, in violation of Section 3005 of RCRA, 42 U.S.C. §6925, and 40 CFR §122.22(f) (1982).

4. Between early 1982 and the present, and specifically on June 9, 1982, respondents Richard Cragle, Ronald Inman, Terry Drexler, Terry Drexler, Incorporated, Western Pacific Vacuum Service, and Golden Penn Oil Company owned or operated a new hazardous waste management facility for storage of hazardous waste without a permit, in violation of Section 3005 of RCRA, 42 U.S.C. §6925, and 40 CFR §122.22(f) (1982).

F. Proposed Order Re Penalties.

Pursuant to Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. §6928, the following ORDER is entered, jointly and severally, against respondents Richard Cragle, Ronald Inman, George Drexler, Terry Drexler, Arrcom, Incorporated, Drexler Enterprises, Incorporated, and Terry Drexler, Incorporated, dba Western Pacific Vacuum Service and Golden Penn Oil Compan

1. (a) A civil penalty of $13,500 is assessed against the respondents, jointly and severally;

(b) Payment of the full amount of the civil penalty assessed shall be made within 60 days after service of this ORDER upon respondents by forwarding to the Regional Hearing Clerk, EPA Region 10, a cashier's check or certified check payable to the United States of America.

IV. The Rathdrum Site -- X83-04-02-3008

Complaint X83-04-02-3008 alleges that George Drexler and his corporations, Terry Drexler, and W.A. (Alan) Pickett operated an HWM Storage and disposal facility for used oil which was mixed with spent solvents. The facility is located near Rathdrum, Idaho, five miles east of the Idaho-Washington border on state highway 53. The facility was eligible for interim status. Violations charged are in three categories -- a.) Disposing of hazardous wastes at the Rathdrum facility without submitting proper Notification or a Part A permit application, b.) submitting a part A permit application for a storage facility without obtaining the owner's signature, and c.) violating several facility standards applicable to HWM facilities eligible for interim status. Penalty amounts for these violations total $73,500. Each respondent is jointly and severally liable for this penalty amount.

A. Factual Backround at the Site

Approximately five miles south of Rathdrum, Idaho, near state highway 53, sits a facility for the storage of used oil and other substances. The facility consists of several above-ground tanks of varying sizes, an underground tank, a loading rack, and three small buildings, one of which contains a shaker screen used for filtering used oil and some small storage tanks. (R27-8, 255-8; Cmplt. Ex. 48, p. 36-7, Cmplt. Ex. 19-Idaho, pp. 7 & 8) Sometime in 1977, Arrcom, Incorporated, and George Drexler purchased the facility from respondent W.A. (Alan) Pickett. (R 257-260) Arrcom used the facility for the storage and disposal of used oil, spent solvents, and other substances prior to treatment of the substances for resale as fuel. (R 257-9; Cmplt. Ex. 1,3,8,9,40,& 48-Idaho)

Arrcom, Inc. sold the Rathdrum facility, including all real and personal property, to respondent Warren Bingham on December 14, 1979. (Cmplt. Ex. 48, p. 33; Cmplt Ex. 49-Idaho) Mr. Bingham leased the property to Arrcom at approximately the same time, for continued use by Arrcom and others as a waste oil and other substances storage and disposal facility. (R 260-262)

On May 19, 1980, regulations promulgated under RCRA became effective. They classified certain substances as solid wastes and/or hazardous wastes, subject to regulation under RCRA. Handlers of these substances were required to submit formal Notification and permit applications for facilities which stored, treated, or disposed of these substances by November 19, 1980, as described in part II. C., above. On August 20, 1980, EPA received a Notification of Hazardous Waste activity from Drexler Enterprises, Incorporated (hereinafter Drexler Inc.) regarding the Rathdrum facility. The Notification stated that the facility was owned by George Drexler, and operated by Drexler Inc. Thomas Drexler was listed as the vice-president of the corporation and the facility contact. In that capacity, Thomas Drexler signed the Notification. The document indicated that the Rathdrum facility generated, transported, and/or stored hazardous waste in the form of petroleum sludge. (Cmplt. Ex. 1-Idaho) EPA Identification No. IDD00800961 was assigned to the Rathdrum facility.

On November 17, 1980, Drexler Inc. submitted a part A application form for the Rathdrum facility. This document stated that Drexler Inc. was the owner and operator of the facility, and bore the signature of W.A. (Alan) Pickett as secretary of Drexler Inc. in the operator and the owner certification section. This time, W.A. (Alan) Pickett was listed as the facility contact. The 1980 part A application stated that the facility stored hazardous waste, in tanks which had a 67,000 gallon capacity. Only ignitable characteristic

waste was indicated as present at the facility on this submission, and this was described used oil only. Quantities of 1,250,000 gallons of this hazardous waste were estimated to be the annual intake of the Rathdrum facility. The document also stated that the facility began operation on January 1, 1980, thus making the facility eligible for interim status. (Cmplt. Ex. 3-Idaho, original)

On February 3, 1981, Linda Dawson, EPA employee in charge of the permitting if this facility, received a letter from George Drexler, asking that interim status be granted for the facility. George Drexler was named as the person in charge at the facility, and the letter stated that only waste oil was stored at the facility. The letter also stated that "all substantive environmental standards" were being followed at the facility. (Cmplt. Ex. 4-Idaho)

On August 13, 1981, EPA notified George Drexler that the Rathdrum facility had qualified for interim status. However, the recognition letter made clear that the status was acknowledged only for the storage of ignitable characteristic waste in the form of used oil. The letter specifically informed Arrcom/Drexler Inc./George Drexler that other hazardous wastes, such as spent solvents, could not be handled at the facility until a revised part A permit application was filed, listing any additional wastes. The letter also specifically informed the respondents that the facility was subject to operating standards set forth in 40 CFR Part 265. Interim status for the disposal of any hazardous substance, listed or characteristic, was never recognized by EPA in this or any other letter. (Cmplt. Ex. 7-Idaho)

Meanwhile, the Rathdrum facility was accepting hazardous wastes other than ignitable waste oil for storage and disposal at the plant. (Cmplt.

Ex. 40 & 48-Idaho) These manifests document the purchase, and transfer of various spent solvents and characteristic waste from United Paint Manufacturing, Inc. of Greenacres, Washington to the Rathdrum facility. These transfers took place on a regular basis from at least November 19, 1980 to December 3, 1981, shortly before the facility ceased active operation. Thomas Drexler signed for these hazardous wastes, indicating that he was vice-president or plant manager on these documents. "Disposal dates" are also indicated on the manifests. In addition, EPA received reports that other solvents specifically contained in the F001-F005 listings for §265.31 were received at the plant. (Cmplt. Ex. 7-Idaho)

Eventually, after Ms. Dawson's prompting and inquiries, on December 3, 1981, W.A. (Alan) Pickett admitted that the Rathdrum facility was accepting spent solvents and mixing these solvents with waste oil at the Rathdrum facility. (Cmplt. Ex. 8-Idaho) On the same day, George Drexler acknowledged this problem, and agreed to resubmit a part A application from for the facility. (Cmplt. Ex. 9-Idaho) The original part A application form was returned to Arrcom by EPA on December 4, 1981, with instructions to include all hazardous wastes handled and the facility. (Cmplt Ex. 10-Idaho)

The Rathdrum part A application was returned on January 6, 1982. This time, Arrcom, Inc. was named as the operator. Ownership information was not changed. The document stated that listed wastes in the form of spent solvents, Hazardous Waste Nos. F003 and F005, 40 CFR § 265.31, were stored at the facility, in annual quantities of 25,000 gallons. [Cmplt. Ex. 9-Idaho (similar to Cmplt. Ex. 3-Idaho but marked "revised" on the bottom of p.1)] This application was returned to Arrcom for incompleteness. By letter dated February 9, 1982, EPA informed Arrcom/Drexler Inc. that it had to submit a

complete part A application or a closure plan for the facility by February 19, 1982. (Cmplt. Ex. 5-Tacoma) Nothing further was ever received from any of the operators of the facility.

Owner Warren Bingham evicted his tenants for non-payment of rent in January of 1982. (R 260-262, 288-89) On July 20, 2982, EPA officials conducted an inspection and sampling effort at the Rathdrum facility. Michael Brown, EPA inspector, was told, and independently determined, that the plant was not in operation at that time, and had essentially been abandoned since the eviction. (Cmplt Ex. 19 & 20- Idaho) Athena Lalikos, EPA inspector, was told by Mr. Bingham that the facility was not operating, and had not been since the departure of Arrcom. (R 142-45) The inspection revealed that prior to abandonment, oil had been spilled throughout the location, and that tanks containing oil were visibly leaking oil onto the ground. (R 144-45,159-65; Cmplt Ex. 48, pp. 36-39, 41-43; Cmplt Exs. 19,20, & 21-Idaho) Ms. Lalikos described the area as a "carpet of fluid, of oil", and described the tanks as in bad repair and leaking. (R 144) This oil on the ground was present despite the fact that Arrcom had changed the dirt and gravel at the facility before it began operations there. (R 256) The inspection revealed no evidence of any record keeping of any kind at the facility. No complete or continous fence surrounded the site. Tanks were in general disrepair. No safety equipment or fire extinguishers or telephones were present at the facility. (Cmplt Exs. 19, 20 & 21-Idaho; Cmplt Ex. 48, pp. 39-43; R 145-146).

During the course of the past three years, Michael Brown searched other records belonging to the various respondents. Arrcom/Drexler records held by the Federal Bureau of Investigation were subpoened by EPA. After access was given to these records, Mr. Brown searched for applicable records

records belonging to Atlee Foss, accountant associated with George Drexler and Arrcom. No applicable records were found there. (Cmplt. Ex. 48, pp. 49-52)

Samples were taken by Ms. Lalikos at the July 20 inspection. Sample 225479 (Lab No. 29000) was an oil contaminated soil sample, taken near one of the finished oil storage tanks at the south end of the site. Analysis of that sample revealed the presence of methylene chloride, a listed waste under Haz. Waste No. F002, and trace amounts of other listed hazardous wastes. Sample No. 225480 (Lab No. 29001) was an oil contaminated soil sample taken near a building in the middle of the site where the shaker screen utilized by Arrcom was housed. Analysis of that sample revealed significant concentrations of 1,1,1-trichloroethane (Haz. Waste No. F002), ethylbenzene (F003), and methylene chloride (F005), toluene (F005), and trace amounts of other listed hazardous wastes. (Cmplt Exs. 21, 22, 23, & 24-Idaho) (All F001-F005 wastes are found at 40 CFR § 261.31).

A second, more extensive sampling and analysis effort was conducted on June 6 through June 8, 1983 at the Rathdrum facility, supervised by Carl Kitz, EPA employee. Again, the facility had not been attended to since the eviction, and the materials present were those left by Arrcom/Drexler Inc. Sample 23401 was taken from tank 19, a large storage tank on the north end of the facility used for intitial storing and mixing of used oil and spent solvents. Oil from that tank revealed the presence of ethylbenzene [F003, 5000 ug/l or parts per billion (ppb)], toluene (F005, 6200 ug/l or ppb), and xylene (F003, 17,600 ug/l or ppb). Sample 23410 was taken from another finished oil storage tank, tank 10, near the south end of the facility. Oil there contained ethylbenzene (4,400,000 ug/kg or ppb, or 4400 ppm), toluene

(F005, 1,100,000 ug/kg or ppb, or 1100 ppm), tetrachloroethylene (F002, 310,000 ug/kg or ppb, or 310 ppm), and significant amounts of other listed hazardous wastes. Another finished product tank, tank 8, (Lab No. 23411) contained oil contaminated with ethylbenzene (F003, 3,100,000 ug/l or ppb, or 3100 ppm), tetrachloroethylene (F002, 330,000 ug/l or ppb, or 330 ppm), toluene (F005, 1,200,000 ug/l, or 1200 ppm), and other hazardous wastes. Tank 11, a tank inside the building which housed the shaker screen (Lab No. 23416), was shown to contain ethylbenzene (F003, 1,600,000 ug/kg or ppb, or 1600 ppm), tetrachloroethylene (F002, 100,000 ug/kg or ppb, or 100 ppm) toluene (F005, 900,000 ug/kg or ppb, or 900 ppm) and other listed hazardous wastes including significant quantities of xylene (F003). A sample taken from the soil near tank 19, the large storage tank, (Lab No. 23426) showed the presence of ethylbenzene (F003, 20,000,000 ug/kg or ppb, or 20,000 ppm), toluene (F005, 4,100,000 ug/kg or ppb, or 4100 ppm) and xylene (F003, 170,000, 000 ug/kg or ppb, or 170,000 ppm). (Cmplt. Exs. 43 & 45-Idaho) In other words, used oil found in the main storage tank, in a tanks next to the filtering processor, and in the finished product tanks showed significant levels of listed hazardous wastes associated with spent solvents. Importantly, these levels rose rather than declined as the oil progressed through Arrcom's production line. Alarmingly, the highest concentrations of listed hazardous wastes were found in the oil which was dumped or spilled on the soil. These sampling efforts confirm the respondents own admissions, and clearly show that the Rathdrum facility was a hazardous waste management storage facility for used oil mixed with significant amounts of listed hazardous wastes. The sampling efforts also show that contaminated oil was dumped and spilled onto the soil at the facility, resulting in disposal of used oil contaminated with

significant amounts of listed hazardous wastes. The storage facility was operated in a manner such that several substantive regulations for interim status storage facilities were violated. The disposal was conducted without a permit or acknowledged interim status. The result of this careless and illegal operation was a threat to the public health and environment which resulted in an emergency removal action under Superfund (R 38), and which still remains as a unclosed HWM storage and disposal facility existing over a sole source acquifer.

B. Respondents Collectively Violated the Permitting and Operation Standards Applicable to an Interim Status Facility.

As the discussion above demonstrates, the Rathdrum facility's troubled history is marred by irregularities. The part A permit application was submitted not once, but twice with an improper signature and certification for the owner. The facility operated as a disposal facility without ever having applied for or been recognized as a disposal facility. The facility did operate as a storage facility with interim status, but operated in complete disregard of the substantive standards regarding interim status facilities. The operators of this facility, jointly and severally, are liable for civil penalties for these improper and illegal activities, in the amount of $73,500.

1. Presence of hazardous waste at the facility.

Hazardous waste is defined as a solid waste mixed with a hazardous waste, as hazardous wastes are defined and listed in 40 CFR Part 261. The mixing may be done by the original generator or the storer/disposer, but it is a hazardous waste from the time the original mixture occurs until delisted

or destroyed. The admissions of the respondents, both on forms submitted to EPA and in conversations with EPA personnel, and the 1982 and 1983 sampling efforts show that used oil mixed with significant amounts of listed hazardous wastes associated with spent solvents was stored and disposed at the Rathdrum facility.

2. The Reuse/Recovery Exception.

As explained in part III. B. 4, above facilities which store hazardous wastes of the type found here are not totally excluded from regulation, even if the operation involves the reuse or recovery of the wastes, and must meet the permitting and substantive standards alleged to be violated here. 40 CFR § 261.6(b). Additionally, disposal of any hazardous waste is not effected by the reuse/recover exception, and facilities at which such activities occur must submit appropriate application forms. The reuse/reovery exception is not a bar to the allegations in this complaint.

3. George Drexler, W.A. (Alan) Pickett, and Thomas Drexler are Individually Liable as Operators of the Facility.

For reasons explained in part III. B. 1, above, it is permissible to impose individual liability for the violations charged, despite the presence of a corporate entity, if it can be shown that individuals are operators or owners actively involved in the operation of the facility. The three individually named respondents were operators of the Rathdrum facility. George Drexler was president and sole stockholder (with his wife) of Arrcom, Inc. and Drexler Inc. He personnally appealed for the interim status recognition given the Rathdrum plant, and stated that he was in charge of the operation. He assured EPA officials that the facility was operating in compliance with all standards.

He apparently handled all financing for the facility, both in the original purchase and the subsequent resale and lease. He testified that he directed the repair of the facility when it first started operation, directed that clean dirt and gravel be brought in to the Rathdrum plant, and directed the instalation of cement berms around some of the tanks. George Drexler assured the court that all records appropriated for the facility were kept. (R 280-295) In view of all this, respondent George Drexler was an operator of the Rathdrum facility. His testimony to the contrary is inherently untrustworthy and self-serving, and should not alter this finding.

W.A. (Alan) Pickett did not bother to respond to court inquiries or appear at the hearing. He was a former owner of the facility who retained some financial interest in the facility. (R 259-60, 268) He was in charge of record keeping and permitting for the facility (R 269), and supervised the inflow of product to the facility (R 267-69). He described himself as hazardous waste manager and facility contact. (Cmplt. Exs. 3 & 9-Idaho) He repeatedly communicated with EPA officials concerning permitting and substantive requirements for the facility. He was acting secretary for Arrcom and Drexler Inc. and was given authority by George Drexler to ensure the proper operation of the Rathdrum facilities. (R 268) He was an operator of the facility, fully responsible for the consequences of the illegal operation of the Rathdrum facility.

Thomas Drexler was the plant manager. He signed his name to manifests for hazardous wastes received at the plant, as "plant manager" and as "vice president". He was the vice president of Drexler Inc. He listed himself as facility contact for Rathdrum on the Notification of Hazardous Waste Activity form submitted to EPA. Warren Bingham, the facility owner,

told Michael Brown that he understood Thomas Drexler was "in charge" at the Rathdrum facility (Cmplt. Ex. 48, p. 34). He was an operator of the facility.

All three of these persons were in a position to influence and control the operation of the Rathdrum facility. They were each responsible for the overall operation of the facility. They should now be held responsible for the violations charged here, as operators of the Rathdrum facility.

5. The Plea Bargain Does Not Effect Liability

For reasons stated in part III B. 5., above, the agreement between the United States Attorney for the western district of Washington and respondent George Drexler has no effect on this proceeding.

C. The Proposed Penalty is Appropriate

1. Statutory and Policy Considerations

All penalties proposed in this action are set forth in Complainant's Exhibit 42-Idaho, and were originally formulated pursuant to EPA's 1980 draft RCRA penalty policy (Attachment 4). Classes of violations were assigned pursuant to the classification system found in the policy. Disposal of hazardous waste without a permit or interim status, and the improper security charge are classified as class I violations pursuant to this policy. Other substantive violations are listed as Class II violations in the policy document.

On July 7, 1981, the penalty policy was modified, in a guidance memorandum titled "Guidance on Developing Compliance Orders Under Section 3008 of the Resource Conservation and Recovery Act" from Douglas MacMillan, director of the Office of Waste Programs Enforcement, dated July 7, 1981. (Attachment 5) This memorandum reclassified violations of RCRA. Violations

of interim status regulations were reclassified as class III violations. Accordingly, all regulation violations in this action, except the security requirement violation, were re-computed as class III violations.

The guidance document reserves Class I violations for those violations, either of the statute or of the regulations, which "pose direct and immediate harm or threats of harm to public health or environment." Disposing of dangerous hazardous wastes on the ground, above a sole source acquifer, was considered such a threat. (Cmplt. Ex. 48, p. 55) Failure to maintain security was considered such a threat because of the generally bad condition of the tanks and soil on the site,the nature of the hazardous wastes, and the ease of access to the site. (Id., p. 56) Based upon the foregoing, the Class categorizations by complainant should be upheld.

Six violations were classified as major, in the potential damage category (intrinsic nature of the hazardous wastes and the likelihood for exposure). They are: 1.) the disposal without a permit charge (Section 3005 of the Act), 2.) the adequate security violation (§ 265.14), 3.) the operation of a facility so that unplanned releases would not occur (the tank leakings), (§ 265.31), 4.) the absence of safety equipment (§ 265.32), 5.) the absence of a waste analysis plan (§ 265.32), and 6.) the absence of an inspection schedule (§ 265.15(b)). Because of the inherent danger of spent solvents and their constituents such as xylene, ethylbenzene, and toluene (see previous discussion) and the relation of the violations to the potential and actuality of exposure of these chemicals to the environment and persons, these determinations should be upheld.

Four violations were classified as moderate in the potential for damage category. They are: 1.) absence of a contingency plan (§ 265.51(a)),

2.) absence of manifest records (§ 265.71), 3.) absence of an operating record (265.73), and 4.) absence of a closure plan (§ 265 subpart G). Because these violations directly involved the same extremely dangerous hazardous wastes, but did not involve a likelihood of exposure, this moderate determination should be upheld.

Two violations were classified as minor, in the potential for damage category. The are: 1.) absence of personnel training records of schedules (§ 265.16), and 2.) failure to make contingency plans (§ 265.37). The potential for damage was not considered to be as dramatic for these violations, and these determinations should be upheld.

The conduct category was rated as major for all alleged violations. This was based upon George Drexler's explicit assurance that regulations were being followed at the facility, prior to issuance of interim status recognition by EPA, the failure of the operators to inform EPA of the use of spent solvents at the facility until explicitly confronted with the accusation by EPA officials, and the failure of the respondents to meet several deadlines for the resubmittal of application forms or a closure plan. (Cmplt. Ex. 48, p. 54) These determinations should be upheld.

Based upon these classifications, appropriate matrixes weree assigned to the violations to compute penalty amounts. The mid-range for each matrix cell was chosen for each violation. The total penalty assessed was $73,350. This total assessment is appropriate, and should be upheld by this court. As explained in part III C. 2, above, this penalty amount should be assessed jointly and severally against the operator respondents.

D. Proposed Findings of Fact Re Penalties.

1. A facility consisting of several storage tanks, oil reprocessing

equipment, and three buildings exists on a site located near Rathdrum, Idaho, five (5) miles east of thwe Washington-Idaho stateline on Idaho state Highway 53 (hereinafter "the Rathdrum facility").

2. The Rathdrum facility was operated from at least January 1, 1980 for the storage and disposal of used oil, spent solvents, and chemical substances such as toluene, ethylbenzene, methylene chloride, 1,1,1-trichloroethane, xylene and tetrachloroethylene.

3. The Rathdrum facility was operated by respondents Arrcom, Incorporated, Drexler Enterprises Incorporated, and George W. Drexler, W.A. (Alan) Pickett, and Thomas Drexler, between at least January 1, 1980, and January 1, 1982.

4. Respondent Warren Bingham purchased the Rathdrum facility on January 1, 1980, and thereafter owned and possessed the facility, and thereafter leased the facility to respondent Arrcom, Inc. Arrcom, Inc. (and others) operated the facility under this lease from on or around January 1, 1980 to January 1, 1982. Thereafter, the facility ceased active operation and was owned and controlled exclusively by respondent Warren Bingham.

5. A Part A permit application for interim status as a hazardous waste storage facility was submitted for the Rathdrum facility on November 19, 1980, and this application listed the owner of the Rathdrum facility as Drexler Enterprises, Inc., when the true owner was respondent Warren Bingham.

6. The part A application listed only ignitable characteristic waste in the form of used oil as the hazardous waste stored at the facility. No listed hazardous wastes were c[illegible]imed on the part A application.

7. Interim status for the storage of hazardous wastes with ignitable characteristics, in the form of used oil, was recognized by the EPA on August 11,

1981. No interim status was recognized for the storage of any other hazardous wastes, including any listed hazardous wastes, or for the disposal of any hazardous waste.

8. During the operation of the Rathdrum facility, used oil with ignitable characteristics, and other substances such as toluene, ethylbenzene, methylene chloride, 1,1,1-trichloroethane, xylene and tetrachloroethylene were released into the environment at the facility through the dumping and/or spilling of significant quantities used oil and spent solvents onto the ground at the facility, constituting disposal of these hazardous wastes.

9. During the operation of the Rathdrum facility, inadequate security to prevent the unknowing entry of persons or livestock was placed around the facility.

10. During the operation of the Rathdrum facility, no efforts were made to minimize the possibility of any release of hazardous wastes.

11. During the operation of the Rathdrum facility, no external communication device capable of summoning emergency assistance or other safety devices such as fire extinguishers was kept at the facility.

12. During the operation of the Rathdrum facility, no written waste analysis plan was developed or utilized at the facility.

13. During the operation of the Rathdrum facility, no written inspection schedule for equipment and storage units, or hazardous waste was developed or maintained at the facility.

14. During the operation of the Rathdrum facility, no attempts to make contingency arrangements with local authorities were made.

15. During the operatic of the Rathdrum facility, no manifest records or operating records were maintained at the facility.

16. During the operation of the Rathdrum facility or thereafter, no closure plan was developed or submitted for the facility.

17. On or about January 3, 1982, respondent operators were evicted from the Rathdrum facility by respondent owner Warren Bingham. The facility was not actively operated by Warren Bingham, and was allowed to remain in the same condition as when respondent operators were evicted from the facility.

18. On January 6, 1982, a resubmitted part A permit application was received for the facility by respondent Arrcom, Inc./ Drexler Enterprises, Inc. The application listed spent solvents, EPA Hazardous Nos. F003 and F005 (§ 265.32), as additional hazardous wastes stored at the facility. Respondent Drexler Enterprises, Inc. was again listed as the facility's owner. This application was returned to operator respondents as incomplete. At no time was interim stauts for the disposal any hazardous waste recognized by EPA.

19. After January 3, 1982, no closure plan was submitted for the facility, nor was the facility operated pursuant to applicable RCRA regulations.

20. On June 20, 1982, EPA inspectors found used oil mixed with significant quantities of spent solvents, listed hazardous wastes under 40 CFR § 265.31, stored at the Rathdrum facility, and significant quantities of used oil mixed with significant quantities of spent solvents, listed hazardous wastes under 40 CFR § 265.31, on the ground at the facility. These findings were confirmed by a subsequent sampling effort conducted by EPA on June 6-8, 1983.

21. To date, the Rathdrum facility has not been closed pursuant to the closure requirements found at 40 CFR § 265 subpart G.

E. Proposed Conclusions of Law Re Penalties.

1. From at least January 1, 1980 to the present, the Rathdrum

facility was and is an existing hazardous waste management facility for the storage and disposal of hazardous waste, pursuant to 40 CFR § 260.10. The facility was operated by George Drexler, Thomas Drexler, and W.A.(Alan) Pickett and Arrcom, Inc and Drexler Enterprises, Inc. between at least January 1, 1980 and on or about January 1, 1982. The facility was and is owned by Warren Bingham.

2. The part A permit applications submitted for the Rathdrum facility to EPA were submitted without a proper signatory for the owner, in violation of 40 CFR § 270.10(b), formerly 40 CFR § 122.4(b).

3. The Rathdrum facility was used for the disposal of hazardous wastes without a valid permit or interim status between at least January 1, 1980 and on or about January 3, 1982, in violation of 40 CFR § 270.1(b) and section 3005 of RCRA, 42 U.S.C. § 6925.

4. Inadequate efforts were made at the Rathdrum facility to minimize the possibility of unauthorized entry during the operation of the facility, in violation of 40 CFR § 265.14.

5. Inadequate efforts to minimize the possibility of any release of hazardous waste at the facility were made at the Rathdrum facility during the operation of the facility, in violation of 40 CFR § 265.31.

6. No external communication device capable of summoning emergency assistance or other safety devices was provided at the Rathdrum facility, in violation of 40 CFR § 265.32.

7. No written waste analysis plan was developed or utilized at the Rathdrum facility or elsewhere, in violation of 40 CFR. § 265.13(b).

8. No written inspection schedule was maintained at the Rathdrum facility or elsewhere, in violation of 40 CFR § 265.15(b).

9. No written schedule or records of training were developed or maintained at or for the Rathdrum facility or elsewhere, in violation of 40 CFR § 265.16.

10. No attempts were made to make emergency contingency arrangements with local authorities mear the Rathdrum facility, in violation of 40 CFR § 265.37.

11. No efforts were made to develop a contingncy plan for the Rathdrum facility, in violation of 40 CFR § 256.51(a).

12. No manifest records were retained or kept at the Rathdrum facility, in violation of 40 CFR § 265.71.

13. No operating records were maintained or kept at the Rathdrum facility, in violation of 40 CFR § 265.73.

14. No closure plan for the Rathdrum facility was developed, submitted or kept at the Rathdrum facility, in violation of 40 CFR § 265.112.

F. Proposed Order Re Penalties.

Pursuant to Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928, the following ORDER is entered against respondents Arrcom, Incorporated, Drexler Enterprises, Incorporated, George W. Drexler, Thomas Drexler, and W.A.(Alan) Pickett:

1.(a) A civil penalty of $73,500 is assessed against the respondents, jointly and severally;

(b) Payment of the full amount of the civil penalty assessed shall be made within 60 days after service of this ORDER upon respondents, by forwarding to the Regional Hearing Clerk, EPA Region 10, a cashier's or certified check payable to the United States of America.

G. Proposed Findings and Conclusions Re In Personam Compliance Provisions.

1. The Regional Administrator's (RA's) "process" issued to the Respondents in these proceedings consists of two essentially separate, and different, matters, the first of which is a Complaint for Civil Penalties (an "original" proceeding governed by the rules in 40 CFR Part 22), and the second of which is an in personam directive or order to those persons whom the RA determined to be persons who have violated one or more of the "requirements" of Subchapter III of RCRA, which second matter is herein referred to as a "compliance order"

2. RCRA §§ 3008(b), 3008(h), and 9006(b) are all anomalously structured (largely for historical reasons involving legislative oversight in the 1980 and 1984 amendments) to the extent that they require a civil penalty complaint and a compliance order to be issued as parts of the same document. Despite that peculiarity, the statute does not purport to change the inherent legal character of either of those measures. The "complaint" aspects remain process asserting a claim for relief by way of penalties which is orginally adjudicated by an ALJ after the reception and evaluation of evidence pursuant to 5 U.S.C. §§ 554 and 556, by means of entering an initial decision, i.e. an adjudicative order. That "final" agency order on the complaint aspect "grants relief" to EPA and "merges" the previously unadjudicated claims for penalties into the order, and thereafter EPA has a claim only "on the order" itself. 40 CFR Part 22 governs all hearing measures on the complaint aspects of these proceedings.

3. The case is quite the contrary as to the in personam directives or "compliance order" aspects of the process issued by the RA. The "compliance

order" or in personam aspects of these proceedings are not original proceedings before an administrative law judge ("ALJ") but instead are only "review" proceedings conducted by an ALJ of a regulatory executive enforcement measure previously taken by an RA acting as the executive arm of EPA, and 40 CFR Part 22 does not directly control or address the disposition of the compliance order aspects of these proceedings.

4. The in personam directives which RAs are authorized to issued (pursuant to Delegation Manual section 8-9-A) are "executive commands" and regulatory measures. The do not constitute "relief" to EPA or "redress" for some antecedent claim EPA had. That principle was made abundantly clear under the Clean Water Act in U.S. v Detrex Chemical Industries, Inc., 393 F.Supp. 735 (N.D.Ohio 1975) and subsequent cases which demonstrate that an EPA compliance order does not merge any preexisting claim into it, and does not operate as "relief" to EPA. Such orders are merely regulatory measures designed to coerce compliance. They are executive commands and do not constitute adjudicative activity by EPA. Their issuance results from executive, not judicial, action by EPA. An RA may vacate, modify, and supersede a compliance order issued by him whereas if an ALJ "issued" a compliance order, then the RA could not affect the compliance order terms except in further proceedings before the ALJ.

5. Based upon this analysis of RCRA "compliance orders", it would be absurd (and unlawful) for an ALJ to receive some sort of evidence and then decide as an original matter whether to issue a compliance order; if so, to whom; and if so, containing what terms. The statute does not envisage an RA applying to an ALJ to issue a compliance order as a matter of "relief" as would a Plaintiff apply to a court for an injunction. The compliance

order, instead of being "relief" or "redress" is only a regulatory executive command which may be reviewed adjudicatively for validity or invalidity. That is the proper task of the ALJ in these proceedings and in that respect the ALJ's adjudicative role is much the same as that performed by a court reviewing an EPA compliance order, for example, in a civil action brought by EPA either for civil penalties for the order's violation, or for the specific enforcement of the compliance order. Admittedly, 5 U.S.C. § 706 by its own terms applies to "courts" and does not apply to such review by an ALJ. But the principles set forth in 5 U.S.C. § 706(2)(A) and (B) and (C) and (D) do, nevertheless, determine the validity or invalidity of the in personam decretal provisions of the RAs compliance order and may be used by an ALJ to determine those issues in proceedings such as the instant case.

6. Accordingly, consistent with the findings of fact determined in the penalty aspects of these proceedings, it does not appear (and the Respondents in review proceedings are the "proponents" of an order modifying or vacating the in personam decretal provisions of the RA's compliance order, and have, therefore, the burden of proof on all issues relating thereto) that the order was issued other than in accordance with law, and the evidence does not disclose that the RA's issuance of the order was arbitrary or capricious action, or action contrary to any right of Respondents, or was in excess of statutory authority or jurisdiction of the agency. Furthermore, the decretal provisions of the RA's compliance orders (namely, [A] paragraphs 1 and 2 on pages 3 and 4 of the Order dated May 10, 1983 in cause # X-83-04-01-3008; and [B] paragraphs 1 through 8.(f) on pages 6 through 9 of the Order dated April 27, 1983) do not appear to be an abuse

of the RA's discretion, and are, consequently, adjudged and declared to be valid and effective henceforth with the following exceptions: (a) The phrase, "on receipt of this Order" in the cited decretal provisions must necessarily be construed (because of these review proceedings) to mean "on receipt of a final order of EPA."

(b) The Respondent Bingham, while here declared to be jointly and severally liable with the remaining Respondents to EPA in cause # X-83-04-02-3008, because he settled his liability separately with EPA, is hereby also declared, pursuant to 5 U.S.C. § 554(e), to have his total liability to EPA limited to that provided in the separate agreed order entered herein signed on his behalf and signed by EPA.

7. Admittedly, some prior ALJ decisions in RCRA penalty proceedings, for example In re Ashland Oil, Inc., #9-83-RCRA-10 & 40, and In re L.H., Inc. and C & D Oil Company, #V-W-83-010, do not observe the distinctions made hereinabove and may appear as though the ALJ in those cases was actually issuing as part of his adjudication an in per- sonam order as relief granted to EPA. They need not be necessarily so construed. But even if that were the purport of those decisions, they represent no more than the law of the case in those instances because the analysis set forth above is the necessary and inevitable correct legal result.

Respectfully submitted this 1 day of July, 1985.

D. Henry Elsen
Assistant Regional Counsel
EPA Region 10

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the U.S. Environmental Protection Agency, Region 10, and that on the date shown below copies of the foregoing Complainant's Findings of Fact, Conclusions of Law and Supporting Memorandum were mailed by first-class mail, postage prepaid, to the parties listed on the attached Service List (with the exception of Warren Bingham and Stephen Navaretta).

Dated: July 8, 1985

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